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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARY DOUSETTE et al., Plaintiffs and Appellants, v. CAFE CONCEPTS, INC. et al., Defendants and Appellants.	B188118 (Los Angeles County Super. Ct. No. BC257079)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed in part; dismissed in part.

Freund & Brackey, Thomas A. Brackey II and Craig A. Huber for Plaintiffs and Appellants.

Poskauer Rose, Bert H. Deixler and Michael H. Weiss for Defendants and Appellants.

INTRODUCTION

Plaintiffs Mary Dousette and Michael Marsh appeal from an order granting a motion for a new trial on behalf of defendants James D. Minidis and Lynn Minidis, as well as an order declaring plaintiffs' motion to amend the judgment moot. Defendants James D. Minidis, Lynn Minidis, Café Concepts, Inc. and California Tortilla Fresh, Inc. have filed a protective cross-appeal from the judgment in favor of plaintiffs. We affirm the order granting a new trial and declaring the motion to amend the judgment moot. We dismiss the cross-appeal as moot.

BACKGROUND[1]

On August 28, 2001, plaintiffs filed this action against Café Concepts, Inc. (CC), California Tortilla Fresh, Inc. (CTF), California Pride Foods, Inc. (CPF), Rick Armstrong (Armstrong), James D. Minidis and Lynn Minidis, alleging causes of action for breach of contract, fraud, conspiracy, conversion, breach of fiduciary duty, violation of shareholder's rights and an accounting. The Minidises filed an answer and cross-complained, alleging causes of action for breach of contract, promissory fraud and negligent misrepresentation.[2]

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[1] We are hampered in our review by the failure of the parties to set out a comprehensive statement of facts regarding who testified and what evidence was produced during trial, as required by California Rules of Court, rule 8.204(a)(2)(C). Thus, in those areas where such facts would be helpful, we may deem the failure to do so as a waiver of the issue raised. (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274: "An appellant's failure to state all of the evidence fairly in its brief waives the alleged error. [Citation.]") As a result, we set out a limited recital of facts which are sufficient to address the issues which have been preserved.

[2] Plaintiffs filed requests for entry of default against defendants CC, CTF and CPF on November 15, 2001, and a dismissal without prejudice as to Armstrong on March 12, 2004. Trial proceeded only against James and Lynn Minidis; thus, when we use the term defendants, we are referring to them.

The dispute centered on a commercial transaction negotiated between plaintiffs, defendants and Armstrong in which plaintiffs invested $320,000 for operating capital in exchange for a 39 percent ownership in a business entity to be formed to license the right to sell, own, operate and run a variety of franchise store locations based on a concept-style food operation developed by James Minidis. Armstrong was a certified public accountant who had provided tax consulting services to plaintiffs and defendants and who was to act as the company's operations manager. Plaintiffs contended that the money provided by them was converted by the defendants and defendants effectively usurped the business opportunity for themselves.

A jury trial commenced on April 5, 2005 and concluded on April 18, 2005. The jury returned a verdict in favor of plaintiffs and against defendants in the amount of $6,220.700.00. On August 8, 2005, the court ordered that the defaults of named defendants CC, CTF and CPF be entered along with a judgment in favor of plaintiffs on the complaint and the cross-complaint.

During trial, among other witnesses, plaintiffs called Armstrong to the stand in their case-in-chief. At that time, he was cross-examined by counsel for defendants. Upon conclusion of Armstrong's testimony, counsel for defendants requested that the court order Armstrong to remain on call so he could be recalled as a witness during their case-in-chief.[3] The court so ordered. But when the defendants sought to have Armstrong appear, he would not cooperate. Defendants brought the matter to the court's attention, but the court refused to issue a bench warrant: "yeah, we told [Armstrong] he's subject to recall, but I cannot make that the basis of a civil contempt for his now failure to appear." Counsel sought to serve Armstrong with another subpoena but could not locate him and had to rest his case without recalling him to the stand. The jury began deliberations on Friday, April 15, and the court adjourned for the day without any result.

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[3] Armstrong had been subpoenaed to appear on the first day of trial by counsel for the Minidises but counsel for plaintiffs agreed he need not appear on the first day and he assured counsel for the Minidises that Armstrong would be made available when needed.

Over the weekend, defendants' counsel learned information that led him to believe Armstrong had deliberately evaded process and hid out at the Montage Resort in Laguna Beach, contrary to what counsel had been told by Armstrong's wife. On Monday, April 18, he filed a motion for mistrial contending that Armstrong had intentionally evaded process and had absented himself from the trial with the aid of plaintiffs and their counsel. The motion was supported by declarations setting out facts relating to the contention. The court denied the motion without comment.

After the verdict was returned but before the court entered judgment, defendants sought ex parte relief for reconsideration of their motion for mistrial and leave of court to conduct discovery relating to Armstrong's refusal to return to court. A hearing was scheduled for June 29, 2005. Depending on how the court ruled, defendants could come back after discovery was completed, if ordered, and make a motion for mistrial or for a new trial.

Defendants then filed formal motions for reconsideration of their mistrial motion, as well as a motion for an order (1) granting leave of court to conduct expedited discovery and (2) continuing the stay of entry of judgment or staying execution of judgment. Opposition and evidentiary objections were filed by plaintiffs. The court finally heard the motions on July 22, 2005, and took the matters under submission. It denied the motion for reconsideration as untimely and the motion for leave to conduct discovery as premature because judgment had not yet been entered.

On August 8, 2005, along with ordering default of defendants CC, CTF and CPF and entering judgment, the court also granted defendants' renewed motion to expedite discovery. It signed an order granting defendants leave to conduct, on shortened notice, the oral depositions of Armstrong, Mayda Armstrong (Armstrong's wife), Jennifer Armstrong (Armstrong's daughter), Christopher Armstrong (Armstrong's son), plaintiff Marsh, Scott Ruhe, Terry Armstrong, the custodian of records of the Montage Resort & Spa, and the custodian of records of Armstrong's telephone service providers. In addition, plaintiff Marsh was ordered to provide defendants immediately with all the telephone numbers (both cellular and land line) that he used from April 8, 2005 to

April 18, 2005. The court also authorized defendants to require the deponents to produce certain documents and writings.

On August 19, 2005, the trial court denied plaintiffs' ex parte application for an order amending the judgment to add Red Brick Pizza, Inc. as a judgment debtor or, in the alternative, to shorten time to notice and hear a motion regarding the same and directed plaintiffs to file the appropriate motion. The court, however, granted defendants' ex parte application for an order compelling plaintiff Marsh to comply with the court's August 9 order requiring disclosure of his telephone numbers and granting leave of court to conduct a second deposition of Armstrong.

On August 23, 2005, defendants filed their notice of intention to move for a new trial. They thereafter sought an additional 20 days to file their supporting affidavits. Subsequently, the parties stipulated and the trial court ordered that the defendants had to and including September 16 to file and personally serve any affidavits and memorandum of points and authorities in support of their motion for new trial; plaintiffs in turn had to and including September 26, to file and personally serve any counter-affidavits and opposition; defendants then had to and including September 30, to file a reply and evidentiary objections. The motion for new trial was scheduled to be heard on October 5.

On August 24, 2005, the court ordered Armstrong to appear for deposition and to produce records. That same day, defendants filed an ex parte application for an order to show cause why plaintiff Marsh and others should not be held in contempt of court and for leave to conduct further discovery. The court granted the application as to plaintiff Marsh and set the matter for an OSC hearing, at which the court made no finding of contempt but granted the request to conduct discovery. The court further granted the request that Marsh provide his consent for defendants to obtain his telephone records.

On August 25, 2005, plaintiffs filed a motion for an order amending the judgment to add Red Brick Pizza, Inc. as a judgment debtor.

On September 16, 2005, defendants filed their points and authorities and supporting evidence in connection with their motion for a new trial. The first ground for new trial was "irregularity in the proceedings" resulting in an unfair trial based on

Armstrong's failure to return to court during defendants' case-in-chief. Based upon Armstrong's deposition taken after the verdict in connection with posttrial proceedings, defendants identified favorable testimony they would have been able to elicit from Armstrong had he appeared during their case-in-chief. Among that information was the fact that defendants were not siphoning funds from CC, as contended by plaintiffs; that all of plaintiffs' investment of $320,000 was put into CC; Armstrong would have contradicted testimony by Marsh that Marsh was unaware of advances from CC to another entity; that Armstrong provided financial information to Marsh contrary to Marsh's testimony at trial; and that while Armstrong claimed to be an impartial witness he did in fact have a substantial financial interest in the outcome of the trial favorably to plaintiffs.

One of the declarations in support of the motion for a new trial was that of Gary Schoffner, counsel for defendants. He laid the foundation for various items attached in support of the motion including: transcripts of trial proceedings; portions of posttrial deposition transcripts of Marsh, Armstrong and Armstrong's wife and others; copies of telephone records of Marsh and Armstrong; and records from the Montage Hotel in Laguna Beach regarding Armstrong's stay at the hotel at the time Schoffner was attempting to locate Armstrong to testify during defendants' case-in-chief. In his declaration, Schoffner set out what steps were taken to secure Armstrong's appearance at trial and reviewed the evidence which had been obtained after trial regarding attempts to locate Armstrong and why he did not appear at trial. The trial court sustained some objections to Schoffner's declaration but not to the following portions:[4]

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[4] The minute order of October 5, 2005, reflects rulings made with regard to objections by plaintiffs to the declaration of Schoffner. The first objection was to the whole declaration and the remaining objections were to portions of the declaration. The minute order states that the court sustained objections to "numbers 1, 2, and 3" and thereafter sustained only some of the specific objections while overruling the remaining ones. The reporter's transcript does not reflect that the trial court sustained objection 1. Instead, the trial court addressed only objections to specific portions of the Schoffner declaration. We conclude the minute order is mistaken.

"26. Of course, I had no way of knowing that Mr. Armstrong was hiding out in Laguna Beach, and no way of tracking him down there. Armstrong admitted to several witnesses that he went to the hotel in order to hide out, including his daughter Jennifer Armstrong; his former wife, Terry Armstrong; and his friend and former brother-in-law, Scott Ruhe. According to his daughter, Mr. Armstrong admitted to hiding out from people looking for him:

"Q Did he [Mr. Armstrong] tell you that he was staying at the Montage that night because he was hoping people wouldn't be able to find him?

"A Yes.

"27. Attached as **Exhibit Y** is a true and correct copy of the deposition of Mr. Armstrong's former wife Terry Armstrong, taken on September 6, 2005. According to . . . Terry Armstrong, Mr. Armstrong knew that he was required to be in court:

"Q [A]t some point did your [former husband] tell you that he knew he was supposed to go back to court to testify in connection with the defense being presented by Lynn and Jim Minidis?

"A Yes.

"Q But I want you to be as specific as you can in terms of what he told you.

"A . . . . He said he went to the Montage – he said, 'I went to court, I had the intention of going back to court the next day, but he said, 'They told me it would be better for the case if I did not come back. If they can't find me I don't have to go.'

"Q And did he tell you that he was told not to go back to court?

"A Yes.

"28. Attached as **Exhibit Z** hereto is a true and correct copy of the deposition of Mr. Armstrong's friend and former brother-in-law, Scott Ruhe, taken on September 13, 2005. According to Mr. Ruhe, Mr. Armstrong also told *him* that Dr. Marsh or his lawyers wanted Armstrong to make himself unavailable for a few days.

"Q And did [Mr. Armstrong] tell you that Dr. Marsh told him that it was best for him to be unavailable for several days?

"A I believe it was either Dr. Marsh or Dr. Marsh's attorneys that had told him it's best for him to be unavailable for the next few days.

"Q Is that what Rick Armstrong told you during the conversation?

"A Yes.

"Q . . . . During your conversations with Rick Armstrong, did he tell you who the person was who told him not to go back to court?

"A I believe it was Dr. Marsh but it might have been Dr. Marsh's attorneys and but I'm fairly certain it was Dr. Marsh.

"Q Is that what Rick Armstrong told you.

"A Yes."

On September 23, 2005, defendants filed an ex parte application for an order allowing them to review Marsh's telephone records and an order shortening time for service of notice of motion for discovery sanctions. The application was granted, and the court set the matter for hearing on September 29. It also granted defendants' request for an order permitting review of Marsh's telephone records.

Defendants' motion sought issue and evidence sanctions against plaintiff Marsh based on his refusal to provide telephone records and his conduct at his deposition. Defendants requested that the court "impose an issue sanction establishing that Marsh facilitated Armstrong's failure to reappear at trial to complete his testimony." In the alternative, they requested that the court decline to consider Dr. Marsh's various declarations and preclude Plaintiffs from offering evidence in opposition to Defendants' motion for a new trial."

On October 5, 2005, the motion for evidentiary sanctions was heard before the motion for a new trial. With regard to the issue of evidentiary sanctions, the court made the following statement:

"Okay, now I know that there is something else that I need to rule upon, and that is the evidentiary objections. No. Sanction filed by the defense. This is

regarding the production of telephone numbers by Dr. Marsh as well as what he did at the deposition. And the defense is asking for evidentiary sanctions. I think the plaintiff asking – comes back with a monetary sanction of $6,000. Or something.

"I read – I watched the videotape, and in considering this, I didn't consider the deposition of Armstrong, et cetera. I just focused on the two issues really: the production of telephone numbers, which I think I ordered, as I remember, Dr. Marsh to produce; but as to the issue of production of the records, I find that he was not required to produce the telephone records but that he was supposed to give all the telephone numbers that he used.

"Then, of course, I know that I ordered him to appear for deposition, and he did appear. However, he did not complete the deposition. I think that the deposition notice said he was to appear and be deposed day to day until completed.

"So therefore – then, I obviously understand what he said in the videotape and I'm going to impose an evidentiary sanction. And my evidentiary sanction – I find that it was more likely to be true than not that he did – Dr. Marsh participated in the nonappearance of Mr. Armstrong."

The court then addressed the motion for a new trial. After argument, it denied defendants' motion for a new trial on the grounds of insufficiency of the evidence, excessive damages and newly discovered evidence (Code Civ. Proc.[5] § 657, pars. 4, 5 & 6), but granted the motion on the grounds of irregularity in the proceedings by an adverse party and surprise which ordinary prudence could not have guarded against (*id*., pars. 1, 2 & 3). The court then took plaintiffs' motion to amend the judgment off calendar, declaring the motion moot.

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[5] All further statutory references are to the Code of Civil Procedure.

On December 2, 2005, plaintiffs filed a notice of appeal from the judgment, the order granting defendants' motion for a new trial and the order declaring their motion to amend the judgment moot. On December 30, defendants, along with CC and CTF (but not CPF), filed a protective cross-appeal from the judgment vacated by the grant of a new trial.

DISCUSSION

1. PRELIMINARY ISSUES

Before addressing the actual motion for a new trial, plaintiffs contend the trial court: (1) abused its discretion in allowing defendants to conduct discovery after the verdict; (2) erred in how it ruled on evidentiary objections made by plaintiffs in connection with the motion for a new trial; and (3) abused its discretion in selection of an evidentiary sanction rather than a lesser sanction. We first review basic appellate principles.

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must affirmatively be shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

"Appellant has the burden of overcoming the presumption of correctness and for this purpose, must provide an *adequate appellate record* demonstrating the alleged error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 8:17, p. 8-5.)

"It is axiomatic that an appellant must support all statements of fact in his briefs with citations to the record [citation] and must confine his statement 'to matters in the record on appeal.' [Citation.]" (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29.) "It is the duty of counsel to refer the reviewing court to the portion of the record which

supports appellant's contentions on appeal. [Citation.] If no citation 'is furnished on a particular point, the court may treat it as waived.' [Citation.]" (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

"Appellant's burden also includes the obligation to present *argument and legal authority* on *each point* raised. This requires more than simply stating a bare assertion that the judgment, or part of it, is erroneous and leaving it to the appellate court to figure out why; it is not the appellate court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. [¶] When appellant asserts a point but fails to support it with reasoned argument and citations to authority, the court may treat it as *waived* and pass it without consideration. [Citations.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:17.1, pp. 8-5 – 8-6.)

Plaintiffs' argument regarding further discovery is based on the premise that defendants' reliance upon section 2036 was error because that section had been repealed. Plaintiffs argue the trial court abused its discretion in not denying the motion on this ground.

As previously noted, the court did initially deny the request because it was premature. But the court later did allow the discovery. The fact is that while section 2036 had been repealed, it was reenacted as section 2036.010.[6] Section 2036.010 "continues former Section 2036(a) without change, except to conform the cross-references." (Cal. Law Revision Com. com., 21A West's Ann Code Civ. Proc. (2007 ed.) foll. § 2036.010, p. 574.) Thus, while the actual section number had changed, the same

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[6] Section 2036.010 provides: "If an appeal has been taken from a judgment entered by any court of the State of California, or if the time for taking an appeal has not expired, a party may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.710) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), for the purpose of perpetuating testimony or preserving information for use in the event of further proceedings in that court."

authority existed within the law providing the trial court with discretion to allow further discovery.[7]

Plaintiffs also contend the trial court erred in relying upon much of the evidence proffered by defendants in connection with their motion for new trial. It is urged that much of the evidence was inadmissible hearsay and self-serving. But plaintiffs do not reference any specific objection, cite to any portion of the record or present any argument and authorities to support their contention. They have therefore waived these claims. (*Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 8:17.1, pp. 8-5 – 8-6.)

Finally, plaintiffs' claim that the trial court abused its discretion in granting the evidentiary sanction has also been waived. Plaintiffs' brief contains only limited references to the record on the subject and then only to portions of the record which are favorable to plaintiffs. There is no statement of facts setting out what evidence was before the court on the issue nor is there any citation to any materials presented by defendants in support of their motion. We consider the issue waived. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115; Eisenberg et al., Cal. Practice Guide, Civil Appeals and Writs, *supra*, ¶ 8:17, p. 8-5.)

2. THE MOTION FOR A NEW TRIAL

Sufficiency of the Order Granting a New Trial

Plaintiffs contend that the order granting the new trial is insufficient because it does not clearly state the reasons for granting the new trial or the evidence upon which the court relied. They contend that an insufficient order means that we review the grant of new trial de novo, citing *Thompson v. Friendly Hills Regional Medical Center* (1999)

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[7] We also note that when defendants filed their supplemental authorities for the later discovery motion they did cite to the appropriately renumbered section. Appellants mount no further argument and present no other authority for their argument that the trial court abused its discretion in allowing further discovery.

71 Cal.App.4th 544, 550. Plaintiffs are correct regarding the standard of review if an order is insufficient. But we find the order here sufficient.

"[I]t will be sufficient if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he finds one or more of the grounds of the motion to be applicable to the case before him. No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case. For example, if the ground is 'irregularity in the proceedings' caused by counsel's referring to insurance, the judge should state that the reason for his ruling was the misconduct of counsel in making such reference. . . ." (*Mercer v. Perez* (1968) 68 Cal.2d 104, 115.)

We agree with plaintiffs that the trial court's order granting the motion for new trial is somewhat terse. But it is quite clear from the record that the reason the trial court granted the new trial was plaintiff Marsh's participation in the nonappearance of witness Armstrong.

The postverdict discovery focused upon why Armstrong did not return to trial to testify in defendants' case-in-chief. Defendants' motions for evidentiary sanctions and new trial were heard on the same day. The trial court first ruled on the evidentiary sanctions, granting the motion as noted above, and then heard argument on the motion for new trial where the issue of Armstrong's failure to appear was thoroughly addressed. The court then granted the motion for new trial on the grounds of irregularity in the proceedings and surprise, after denying the motion on other grounds. It is inescapable that it was Armstrong's failure to appear which resulted in surprise to defendants and their counsel and that it was Marsh's complicity in Armstrong's failure to appear which the court concluded constituted irregularity in the proceedings.

Stated otherwise, the evidentiary sanction imposed on plaintiffs by the trial court formed the basis for its determination that a new trial was warranted due to plaintiff Marsh's misconduct. Inasmuch as a "trial court satisfies section 657 if its order indicates it deliberated over the issues" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 415)

and the order under review here demonstrates such deliberation, we conclude that the order is sufficient, and we utilize an abuse of discretion standard of review.

The Merits of the Motion

The trial court's power to grant a new trial is derived solely from section 657. Here, the trial court relied upon irregularity in the proceedings and surprise, each of which is an appropriate basis under section 657 to grant a new trial.

Where we find the order adequate, as here, "the appropriate standard of judicial review is one that defers to the trial court's resolution of conflicts in the evidence and inquires only whether the court's decision was an abuse of discretion." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 636.) The determination "whether, under all the circumstances, an irregularity has materially affected substantial rights and prevented a fair trial is addressed to the discretion of the trial court which, having heard and seen the witness[es] and having knowledge of circumstances which may not be produced in the record, is in better position than the appellate court to determine the effect." (*Gray v. Robinson* (1939) 33 Cal.App.2d 177, 182.)

"'[A]n overt act of the trial court, jury, or adverse party, violative of the right to a fair and impartial trial, amounting to misconduct, may be regarded as an irregularity.'" (*Russell v. Dopp* (1995) 36 Cal.App.4th 765, 780, quoting *Gray v. Robinson*, *supra*, 33 Cal.App.2d at p. 182.) Plaintiffs contend that there was no irregularity justifying the grant of a new trial, in that defendants failed to subpoena Armstrong and there was no evidence (apart from the court's evidentiary sanction) that plaintiff Marsh in any way contributed to Armstrong's decision not to return to trial to testify for the defense. Plaintiffs are wrong on each count.

Defendants did subpoena Armstrong to be present on the first day of trial. In order to accommodate Armstrong and the delay of trial, counsel for the parties and Armstrong agreed he would be available during plaintiffs' case-in-chief, which he was. Such an agreement retains jurisdiction over the witness. (§ 1985.1) At the end of Armstrong's testimony in plaintiffs' case-in-chief Armstrong was not discharged but was dismissed "subject to recall." That was sufficient for the court to retain jurisdiction over Armstrong

notwithstanding what the trial court mistakenly thought: "A witness, served with a subpoena, must attend at the time appointed, with any papers under his control lawfully required by the subpoena, and answer all pertinent and legal questions; and unless sooner discharged, must remain until the testimony is closed." (§ 2064.)

Because Armstrong was an "on call" witness, it was then defendants' responsibility to have him present in court when needed. (L.A. Super. Ct. Rule 8.82.) Counsel for the defendants did attempt to have Armstrong return but he did not cooperate. And the trial court made a factual finding that it was "more likely to be true than not true that [Dr.] Marsh participated in the non-appearance of witness Armstrong." The evidence presented by Schoffner in his declaration in support of the new trial supports this finding, as well as the court's determination there was irregularity in the proceedings.

Plaintiffs argue defendants failed to demonstrate prejudice from that irregularity. Although defendants had the burden of establishing prejudice below, plaintiffs have the burden of establishing a lack thereof on appeal. (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230.) Plaintiffs have failed to do so.

The trial court has no discretion to grant a new trial for harmless error. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.) Prejudicial error is a constitutional prerequisite for the grant of a new trial. (Cal. Const. Art. VI, § 13.) Thus, "*every* order granting a new trial presupposes a finding that there has been 'a miscarriage of justice.'" (*Mercer v. Perez, supra*, 68 Cal.2d at p. 111.)

Plaintiffs' failure to set out an adequate statement of facts within their opening brief on appeal waives their claim. The sprinkling of citations to select portions of the record contained in plaintiffs' legal discussion is simply insufficient to enable us to assess prejudice in this case. The only citation to the record on the issue is to the pages on which Armstrong's testimony begins and ends. "When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly being made."

(*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) We presume that the order granting the motion for a new trial is correct. (*Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 61.)[8]

We also conclude that the grant of new trial applies to Dousette notwithstanding that the trial court focused upon the actions of Marsh. Armstrong's testimony went to the entirety of the case which included liability of defendants for the claims made by plaintiffs. Plaintiffs cite no legal authority that would allow one plaintiff to benefit from the misconduct of another plaintiff where that misconduct prejudiced defendants and deprived them of a fair trial. There is no way to justify upholding the judgment in favor of Dousette given the prejudice resulting from Marsh's actions.

Nor did the trial court err when it granted a new trial as to all parties, including those that were declared in default. A general motion seeking a new trial followed by a general order granting it customarily affords all parties a new trial, including those that did not move for one. (*Wolfson v. Beatty* (1953) 118 Cal.App.2d 392, 398; *Bishop v. Superior Court* (1922) 59 Cal.App. 46, 48; *Murphy v. Bridge* (1919) 43 Cal.App. 87, 90.) That does not mean the default of those parties has been set aside.

Finally, we agree with the trial court that the grant of new trial operated to make plaintiffs' motion to amend the judgment to add Red Brick Pizza, Inc. moot. The effect of the grant of new trial was to vacate the judgment.[9]

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[8] Plaintiffs also challenge the trial court's grant of a new trial on the grounds of surprise which ordinary prudence could not have guarded against (§ 657, par. 3). In light of our conclusion that a new trial properly was ordered due to irregularity in the proceedings, we need not decide if surprise constituted an independent basis for the grant of a new trial.

[9] Our decision to uphold the order granting defendants' motion for a new trial renders defendants' protective cross-appeal from the judgment moot. (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 872; *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 987.)

DISPOSITION

The order granting defendants' motion for a new trial and the order declaring plaintiffs' motion to amend the judgment moot are affirmed. Defendants' protective cross-appeal from judgment is dismissed. Costs are awarded to defendants.

NOT TO BE PUBLISHED

HASTINGS, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

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* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.